In the present case, the facts given by the police did not show which of the three was armed with the deadly weapons, the pistol and the kukri. The record showed that the clerk and driver were held up by three Chinese armed with a pistol and a kukri. Thus on the face of it one of the three would not be armed as there were only two weapons. The prosecution should have clarified from the clerk and the driver who was armed and with what and framed separate charges in respect of the persons armed with the two weapons and then consolidate the trial with that of the other charged with simple robbery. I do not think it was necessary to invoke section 397 in the present case as the three had been charged under the second limb of section 392, which already provides for whipping for an offence committed between the hours of sunset and sunrise. It has not been shown which of the three had been armed and I do not propose, therefore, to maintain the sentence of whipping that has been imposed on the two appellants. Accordingly I set aside the order sentencing them to 12 strokes of the rattan as violence was not used against anybody in the commission of this robbery. The sentence of 3 years imprisonment is the maximum the sessions court president has power to impose. In the light of the fact that the learned president himself in his grounds of judgment stated that there have been far too many robberies in town these days and I should refrain from interfering with the discretionary powers exercised by him as to the punishment. Accordingly I confirm the sentence of 3 years' imprisonment on the two appellants.

In respect of the other accused I set aside the order of binding over under section 290 of the Criminal Procedure Code and substitute a sentence of 12 months' imprisonment from date of this order.

Order accordingly.

Solicitors: *Lim, Lim & Oon.*

CENTRAL MALAYSIA DEVELOPMENT CO. LTD. v. CHIN PAK CHIN

[O.C.J. (Gill J.) June 20, 1967]

[K.L. — Civil Suit No. 1062 of 1965]

Land Laws — Agreement to sell — Breach of — Claim for damages — Reciprocal promises — Contracts (Malay States) Ordinance, 1950, ss. 52, 53.

The defendant had issued an option for the sale of the lands in question at $1 per sq. ft., but agreed to reduce the sale price by $34,000 provided this amount was added to the usual 10% deposit of the purchase price of a sale. A deposit of $60,000 was therefore made towards the agreed purchase price of $226,903 leaving a balance of $166,903 to be paid on the date of completion. Under the agreement the defendant was to deposit his documents of title with the plaintiffs' solicitors upon the execution of the agreement, but, as three of his titles had been lost and an application of for new titles had been made, only two documents of titles were so deposited. The defendant gave an assurance that he would try his best to get the new titles by the date of completion. The balance of the purchase price was to be deposited with the defendant's solicitors on or before July 31, 1965. Upon such deposit being made the defendant was to execute a valid and registrable transfer and deliver vacant possession of the lands to the plaintiffs. The balance of the purchase price to be deposited with the defendant's solicitors was to be released to the defendant upon registration of the transfer. Between May and September 1965 a number of letters passed between the solicitors for the parties and it was clear from those letters that the defendant was not in a position to give a valid and registrable transfer to the plaintiffs. His solicitors on August 9, 1965 asked for extension of time up to the end of that month which the plaintiffs did not agree. On August 30, 1965 the defendant's solicitors again wrote for extension of time to complete the sale to September 4, 1965. This second request was also refused. On the strength of their agreement with the defendant, the plaintiffs entered into an agreement with one *YKK* on July 22, 1965, for the sale of the same lands at $1.25 per sq. ft. and received a deposit of $10,000. As a result of the defendant's breach of contract, the plaintiffs were unable to complete their sale to *YKK* on or before August 9, 1965 as agreed. They had therefore to refund the deposit of $10,000 and to pay a further sum of $10,000 as damages and compensation.

The plaintiffs had paid the sum of $166,903 to their solicitors on July 24, 1965. In his defence the defendant alleged that the non-completion of the sale was solely and entirely due to the plaintiffs' failure to send this sum of money to his solicitors as provided in the agreement. He relied on section 53 of the Contracts (Malay States) Ordinance and his case was briefly that the plaintiffs were obliged to pay the said sum to his solicitors before there was any obligation on him to execute a transfer and give vacant possession.

Held: (1) where the reciprocal promises by the parties to a contract were to be performed simultaneously the contention that section 57 of the Contracts (Malay States) Ordinance applied must prevail. In this case the plaintiffs had the money so as to be able to perform his part of the bargain, but the defendant was not in a position to give vacant possession on July 31, 1965. The defendant was therefore in breach of the contract and the plaintiff had the right to repudiate, and were entitled to have their money back;

(2) the normal measure of damages is the market value of the property at the contractual time for completion less the contract price. Because of the difficulties in forming an exact estimate of the market value of a piece of land, on which opinions may well differ, the price at which a plaintiff contracts to resell the property, through strictly irrelevant *per se*, has been taken as *prima facie* evidence of the market value. In the absence of any evidence to the contrary the court had no option but to take the price at which the plaintiffs in this case agreed to sell to *YKK*, *prima facie*, to be the market value; the plaintiffs were entitled to a sum of $56,725 as general damages for loss of the bargain, but they were not entitled to their legal and stamp fees incidental to the drawing of the agreement since they would have had to incur all those expenses if they had had the property conveyed to them. They were also not entitled to recover by way of special damages the sum of $10,000 which they had to pay to the sub-purchaser as liquidated damages.

Cases referred to:—

(1) *Flureau* v. *Thornhill* (1776), 2 Wm. Bl. 1078.

(2) *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158.

(3) *Ranchhod* v. *Manmohandas* (1907), I.L.R. 32 Bombay 165.

(4) *Engell* v. *Fitch* (1869), L.R. 4 Q.B. 659.

(5) *Godwin* v. *Francis* (1870), L.R. 5 C.P. 295.

(6) *Day* v. *Singleton* [1899] 2 Ch. 320.

(7) *Khor Seng Lee* v. *Sithuramasamy Chetty* (1927), 6 F.M.S.L.R. 98.

(8) *Re Daniel* [1917] 2 Ch. 405.

CIVIL SUIT.

M. S. Chooi for the plaintiffs.

P. C. Au-Yong for the defendant.

Cur. Adv. Vult.

Gill J.: This action arises out of an agreement dated the 1st day of June, 1964 for the sale by the defendant to the plaintiffs of five pieces of land held under Entries in the Mukim Register Nos. 3092, 3063, 2465, 3064 and 3091 for Lots Nos. 2291, 2258, 1481, 2259 and 2290 respectively in the Mukim and District of Kuala Lumpur. The plaintiffs' claim is for damages for an alleged breach of the agrement on the part of the defendant and for the recovery of the deposit made against the agreed purchase price on the signing of the agreement.

There is no real dispute about the facts of the case. The defendant had issued an option for the sale of the lands at $1.00 per square foot, but he agreed to reduce the sale price by $34,000 provided this amount was added to the usual deposit of 10% of the purchase price on a sale of land. A deposit of $60,000 was therefore made towards the agreed purchase price of $226,903 leaving a balance of $166,903 to be paid on the date of completion.

Under the agreement the defendant was to deposit his documents of title with the plaintiffs' solicitors upon the execution of the agreement, but, as three of his titles had been lost and an application for new titles had been made, only two documents of title were so deposited. The defendant gave an assurance that he would try his best to get the new titles by the date of completion.

The balance of the purchase price was to be deposited with the defendant's solicitors on or before the 31st of July, 1965. Upon such deposit being made the defendant was to execute a valid and registrable transfer and deliver vacant possession of the lands to the plaintiffs. The balance of the purchase price to be deposited with the defendant's solicitors was to be released to the defendant upon registration of the transfer. There was a stipulation in the contract that time wherever mentioned shall be the essence of the contract. The agreement contained the usual clause as regards the forfeiture of the initial deposit in the event of the plaintiffs failing to deposit the balance of the purchase price with the defendant's solicitors.

Between 5th May and 4th September, 1965, a number of letters passed between the plaintiffs' solicitors and the defendant's solicitors. It is clear from these letters that the defendant was not in a position to give vacant possession of the lands on 31st July, 1965 as agreed, nor had he all the documents of title so as to be able to give a valid and registrable transfer to the plaintiffs. His solicitors wrote a letter dated 9th August, 1965 asking for extension of time up to the end of August, 1965 for delivery of vacant possession. The plaintiffs did not agree to the request for extension of time. On 30th August, 1965 the defendant's solicitors again wrote for extension of the time to complete the sale to 4th September, 1965. This second request for extension of time was also refused.

The plaintiffs paid the sum of $166,903 to their solicitors on 29th July, 1965. The defendant alleges in paragraph 6 of his amended statement of defence that the non-completion of the sale was solely and entirely due to the plaintiffs' failure to send this sum of money to the defendant's solicitors as provided in clause 3 of the same agreement. Paragraph 6A of the amended statement of defence reads as follows:—

> "The plaintiff wilfully withheld the balance of the purchase money of $166,903 and was not ready and willing to part with same by depositing it with the defendant's solicitors. The plaintiff had no intention to complete the sale and had wilfully frustrated defendant's efforts in providing vacant possession. It was agreed vacant possession to be given on registration of the transfer."

The defendant in denying the plaintiffs' claim relies on section 53 of the Contracts (Malay States) Ordinance, 1950 which reads as follows:—

> "Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires."

Thus, the defendant's case, briefly, is that the plaintiffs were obliged to pay the sum of $166,903 to his solicitors before there was any obligation on him to execute a transfer and give vacant possession. This contention is clearly made because of the order in which the reciprocal promises were set out in the contract for sale.

In view of the nature of the defence, the question to be considered is whether the contract expressly fixed any order in which the reciprocal promises were to be performed. In contracts for the sale of land by which one agrees to purchase and the other to convey, the undertakings of the respective parties are always dependent unless a contrary intention clearly appears. Reading the agreement of sale in the present case as a whole, I do not see any clear intention to the contrary. It provided for the balance of the purchase price to be paid on or before 31st July, 1965, for

the execution of a valid and registrable transfer upon such deposit being made and for the delivery of vacant possession upon such completion of the sale. There is certainly nothing in the agreement to suggest that the parties had agreed to vacant possession being given on registration of the transfer, as alleged by the defendant. To my mind, it is clear from a reading of the agreement as a whole that the reciprocal promises by the parties were to be performed simultaneously. In the circumstances the contention on behalf of the plaintiffs that section 52 of the Contracts (Malay States) Ordinance, 1950 applies must prevail. Section 52 reads as follows:—

"When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise."

In the present case the plaintiffs had the money so as to be able to perform his part of the bargain. They had deposited their money with their solicitors and their solicitors had notified the defendant's solicitors accordingly and asked if the defendant was in a position to perform his part of the bargain. As I have stated above, the defendant was in no position to give vacant possession on 31st July, 1965, which on a reading of the agreement as a whole was clearly the date for the completion of the sale, nor was he in a position to execute a valid transfer which could be registered under the provisions of section 110 of the Land Code (F.M.S. Cap. 138). The fact that it was possible to register a transfer under the provisions of section 232 of the Land Code was beside the point. The defendant had in fact twice asked for extension of time to complete the sale. He was therefore clearly in breach of the contract and the plaintiffs had the right to repudiate. As stated in *Halsbury* (3rd Edition) Volume 34, page 324, paragraph 550, the purchaser has the right to repudiate the contract immediately upon the failure of the vendor to perform something which goes to the root of the contract. The inability of the defendant to give vacant possession by itself was something which went to the root of the contract in the present case. The plaintiffs therefore were perfectly entitled to repudiate the contract and they are clearly entitled to have their money back.

On the strength of their agreement with the defendant, the plaintiffs entered into an agreement with one Yap Kok Kuan on 22nd July, 1965 for the sale of the same lands at $1.25 per square foot and received a deposit of $10,000. As a result of the defendant's breach of contract, the plaintiffs were unable to complete their sale to Yap Kok Kuan on or before the 9th day of August, 1965 as agreed. They had therefore to refund the deposit of $10,000 and to pay a further sum of $10,000 as damages and compensation. These payments were not challenged. The plaintiffs are claiming this sum of $10,000 paid as damages and compensation to Yap Kok Kuan as special damages from the defendant. They are also claiming as special damages interest at the bank rate of 9% per annum on the sum of $60,000 paid as deposit and a sum of $251 as legal fees and stamp fees incidental to the drawing up of the agreement.

On the question of general damages for breach of contract, counsel for the plaintiffs said that he was not pressing for any particular amount, although he went on to say that the plaintiffs would have made a profit of $56,725 had both transactions been successfully completed. Counsel for the defendant had nothing very much to say on this, except for his contention that the sum of $10,000 paid to Yap Kok Kuan did not naturally flow from the failure on the part of the defendant to complete.

The general rule as regards damages for breach of contract is to put the plaintiff in the same position as if the contract had been performed, so that normally he is entitled to recover from the defendant his loss of profits, or the benefit of his bargain, as it is often called. It was decided in the old English case of *Flureau* v. *Thornhill* [1] that where a seller of land failed to complete the contract through a defect of title, the purchaser, in the absence of fraud, was not entitled to recover damages in respect of loss of his bargain. This decision was finally confirmed by the House of Lords in the famous case of *Bain* v. *Fothergill*,[2] after which the rule takes its name. The rule, however, does not apply to a case of wilful default in giving possession, nor to unreasonable omission to complete the title by taking some definite steps in the vendor's power, nor to damages caused not by defect of title or any difficulty of conveyancing, but by the vendor's want of reasonable diligence in completing. Moreover, the rule is justified only by the peculiar conditions of English titles and conveyancing, and it has been held not to be law in India (see *Ranchhod* v. *Manmohandas* [3]). McLeod J. said in that case at page 171:—

"As section 73 (section 74 of our Contracts Ordinance) imposes no exception on the ordinary law as to damages, whatever the subject matter of the contract, it seems to me that in cases of breach of contract for sale of immovable property through inability on the vendor's part to make a good title, the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages."

A similar view has been expressed by the other High Courts in India.

Section 74 of the Contracts (Malay States) Ordinance, 1950, reads as follows:—

"(1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

Explanation. — In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

It is to be observed that the section is general in its terms, and does not exclude the case of damages for breach of a contract to sell immovable property. In other words, the legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities. Where, therefore, a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damage alleged to have been caused to him "naturally arose in the usual course of things from such breach".

The normal measure of damages is the market value of the property at the contractual time for completion less the contract price. Because of the difficulties in forming an exact estimate of the market value of a piece of land, on which opinions may well differ, the price at which a plaintiff contracts to resell the property, though strictly irrelevant *per se,* has been taken as *prima facie* evidence of the market value. This was done in *Engell* v. *Fitch* [4] where the plaintiff had given evidence of the resale and the defendant had not countered with any evidence that the resale price did not represent the market price. Because of the same difficulties, the resale price obtained by the defendant, who has backed out of his contract with the plaintiff on making a better bargain with another party, has been taken as evidence of the market price at the time due for completion (see *Godwin* v. *Francis* [5]). In *Ranchhod* v. *Manmohandas,*[3] which was a case of wilful default on the part of the vendor in completing the title, it was held, following *Day* v. *Singleton,*[6] that the purchaser was entitled to recover not only the deposit with interest and expenses, but the loss of his bargain.

In *Khor Seng Lee* v. *Sithuramasamy Chetty* [7] the parties entered into an agreement on 13th January, 1926 for the sale of a two-eighth share in certain lands for $40,000. A sum of $5,000 was paid as deposit by the plaintiff as purchaser. The agreement stipulated for completion on 29th January or earlier if the plaintiff so desired. On 26th January the plaintiff's solicitors telegraphed to the defendant that the plaintiff desired to complete on 28th January. On the same day one Lee Lip registered a caveat against the lands. On 27th January the plaintiff entered into an agreement for resale to one Lim Peh Kee at the enhanced price of $50,000. On 28th January the plaintiff tendered the balance of the purchase price, but the defendant's attorney refused the money. The plaintiff sued for damages for breach. Thorne J. after reviewing a number of earlier authorities on the subject, held that the rule in *Bain* v. *Fothergill* [2] had no application in the F.M.S. and that the amount of damages to be awarded for breach of contract to sell land was governed by section 73 of the Contract Enactment (F.M.S. Cap. 52), which is identical with section 74 of the Contracts (Malay States) Ordinance, 1950. In the result it was held that the plaintiff was entitled to the return of the deposit of $5,000 with interest thereon at 8 per cent from 29th January to date of judgment, and that he was also entitled to damages in the sum of $10,000 as the loss of his bargain, being the difference in the price at which he had agreed to buy the lands and the price at which he had agreed to resell. As regards the sum of $5,000 which the plaintiff had to pay his sub-purchaser, Lim Peh Kee, by way of liquidated damages, it was held that this was a loss which did not naturally and reasonably flow from the breach of the contract because it could not have been in the contemplation of the defendant's attorney at the time of the making of the contract.

The facts of the present case are not very different from the facts in the case of *Khor Seng Lee* v. *Sithuramasamy Chetty.*[7] That was a case in which the purchaser agreed to resell to the third party a day or two before the date fixed for completion. In the present case the agreement by the plaintiffs to resell was made 9 days before the date of completion. It was suggested by counsel for the defendant that this was a fictitious transaction. However, apart from that suggestion from the bar, there was no evidence whatsoever in support of the allegation. There is evidence on behalf of the plaintiffs that when they entered into a contract with Yap Kok Kuan they expected the defendant to complete. As regards the measure of damages, the defendant has produced no evidence as to the market value of the land, apart from saying that since the agreement the value of the land had depreciated and that he was agreeable to transfer the land at the same price even though land values had since appreciated. In the absence of any evidence to the contrary, I feel I have no option but to take the price at which the plaintiffs agreed to sell to Yap Kok Kuan *prima facie* to be the market value. Thus, the plaintiffs are entitled to a sum of $56,725 as general damages for loss of bargain. The plaintiffs are not entitled to their legal and stamp fees incidental to the drawing of the agreement since they would have had to incur all those expenses if they had

had the property conveyed to them. These legal costs are not recoverable where the plaintiff recovers for the loss of his bargain (see *Re Daniel* [8]). The plaintiffs are also not entitled to recover by way of special damages the sum of $10,000 which they had to pay to the sub-purchaser as liquidated damages. In this connection I agree with respect with what was said by Thorne J. in the case of *Khor Seng Lee* v. *Sithuramasamy Chetty*.[7]

In the result the plaintiffs are entitled to recover the sum of $60,000 which they paid as deposit on the date of the agreement together with a reasonable rate of interest, which I fix at 6% per annum, and they are entitled to recover by way of damages for loss of bargain a sum of $56,725. Accordingly there will be judgment for the plaintiffs for $116,725 with interest on $60,000 at 6% per annum from 1st July, 1964 to date and on the aggregate sum of 6% per annum from today to date of realisation. The defendant must also pay the costs of the action as taxed.

Judgment for the plaintiffs.

Solicitors: *Chooi & Co.; P. C. Au-Yong & Co.*

WONG FATT SING v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi C.J. (Malaya)) June 21, 1967]

[K.L. — Criminal Appeal No. 29 of 1967]

Arms — Offensive weapon — Person found in company of possessor of — Denial of knowledge — Size of weapon, place and time of incident — Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, ss. 6(1) & 7(1).

The appellant was convicted on a charge under section 7(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance. On the night in question he was seen in the company of three other male youths on the pavement in Jalan Stadium. One of them was seen throwing an object and subsequently a knife was found at the place where the object was thrown. That person was charged and convicted of having in his possession the knife in question, which was a small dagger about 6" long and 1" or so wide, a thing which could easily be hidden in one's pocket. The appellant gave evidence on oath to the effect that he had not seen the knife before and that he did not know whether the 1st accused possessed it or not. The learned magistrate dismissed this evidence by merely stating that "a mere denial of knowledge that the accused No. 1 was in possession of the dagger was not sufficient. Therefore the circumstances clearly showed that he knew the 1st accused was in possession of the dagger without lawful purpose."

Held: this was a serious misdirection in view of the fact that the knife was small enough to be hidden in one's pocket and the incident took place at night. These circumstances were not sufficient to raise a reasonable presumption that the appellant knew of the existence of the knife in the possession of the 1st accused.

MAGISTRATE'S CRIMINAL APPEAL.

R. P. S. Rajasooria Jr. for the appellant.

Hashim Abdul Majid (Deputy Public Prosecutor) for the respondent.

Azmi C.J. (Malaya): The appellant was charged as follows:—

"That you on 16.6.65 at about 9.30 p.m. at Jalan Stadium, Kuala Lumpur, in the District of Kuala Lumpur, in the State of Selangor, in a public road were found in the company of Chong Yon Lai who had in his possession an offensive weapon to wit a dagger, in contravention of section 6 of the Ordinance, No. 43 of 1958, under the circumstances which raised a reasonable presumption that you knew the said Chong Yon Lai, was in possession of such offensive weapon that you have thereby committed an offence under section 7(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, No. 43 of 1958 and punishable under section 6(1) of the same Ordinance."

The facts of the case briefly are as follows. One night at about 9.30 p.m. appellant was seen in the company of three other male youths on the pavement in Jalan Stadium. One of them (1st accused) was seen throwing an object and subsequently a knife was found at the place where the object was thrown. The 1st accused was charged and convicted of having in his possession the knife in question.

The appellant was tried together with the other men in the same trial. The knife in question is a small dagger about 6" long and an inch or so wide, a thing which could easily be hidden in one's pocket.

The learned magistrate in reference to the case against the appellant said as follows:—

"The third accused (the appellant) in his defence on oath admitted that he was in the company of the other accused. He denied knowledge that accused No. 1 was in possession of the knife. According to him he met accused No. 1 and 2 on his way to the stadium. Under section 7(1) of the Ordinance the onus of proving that the accused 'had reasonable grounds for believing that such other person was . . . . in possession . . . . such weapon for a lawful purpose' lies on the accused. This burden was not discharged by him. There was no evidence at all that he had reasonable grounds for believing the first accused was in possession of the dagger for a lawful purpose. A mere denial of knowledge that accused No. 1 was in possession of the dagger was not sufficient. Therefore the circumstances clearly showed that he knew the first accused was in possession of the dagger, without a lawful purpose."

Section 7(1) of the Ordinance provides that any person who is found in the company of another who is carrying or is in possession any offensive weapon in circumstances which raises a reasonable presumption that he knew that such person was carrying or had in his possession such weapon, unless he shall prove that he had reasonable ground for believing that such other person was carrying or had in his possession or under his control any weapon for a lawful purpose, shall be guilty of an offence.

In this case therefore, in order to make out a case against the appellant, the prosecution must